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IN THE COURT OF APPEAL  
CRIMINAL DIVISION

CASE NO 202202358/A1



Royal Courts of Justice  
Strand  
London  
WC2A 2LL

Friday 27 January 2023

Before:

LORD JUSTICE DINGEMANS

MRS JUSTICE MAY DBE

HIS HONOUR JUDGE CONRAD KC

(Sitting as a Judge of the CACD)

**REFERENCE BY THE ATTORNEY GENERAL UNDER S.36 CRIMINAL JUSTICE ACT 1988**

REX

V

JAMIE MORENO

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MS S GATES appeared on behalf of the Attorney General.

MS COBORNE appeared on behalf of the Offender.

**J U D G M E N T**

LORD JUSTICE DINGEMANS:

**Introduction and grounds of the reference**

1. This is the hearing of an application by His Majesty's Attorney General for leave to refer to the Court a sentence regarded as unduly lenient. The defendant and respondent to the application is Jamie Moreno, who is now 58 years old. The application was before the Court on 27 September 2022 but was adjourned in circumstances where there had been issues over legal representation. As it is Mr Moreno has managed to obtain legal representation and we are very grateful to Ms Gates, on behalf of the Attorney General, and Ms Osborne, on behalf of Mr Moreno, for their helpful written and oral submissions.
2. On 30 June 2022 Mr Moreno pleaded guilty to two counts of assault by penetration contrary to section 2 of the Sexual Offences Act 2003. The penetration was digital and of the vagina in count 1 and of the anus in count 2. He was sentenced to 38 months' imprisonment on count 1 and to 30 months concurrent on count 2. The sentence was to run consecutively to a sentence of 2 years' imprisonment imposed on Mr Moreno at Inner London Crown Court for two counts of sexual assault and one count of attempted assault by penetration. Those offences post-dated the commission of these offences and occurred when Mr Moreno persuaded a flatmate to undergo a massage and attempted to penetrate the victim's vagina during the massage. Apart from those offences Mr Moreno had no material offences recorded against him and was of good character.
3. The issues raised by the application are first, whether the judge was wrong to categorise this offence as category 3B and not category 2B for the purposes of the Assault by Penetration Guideline; secondly, whether the judge was wrong to ignore the victim's personal statement because it was made after Mr Moreno's late guilty plea; and thirdly, whether a discount of 15 per cent for Mr Moreno's guilty plea was too generous. We

grant leave for the Reference.

### **The Factual Circumstances**

4. On Thursday 25 July 2019 the complainant "PRP" (then aged in her 30s) was on a night out with her work colleagues. The complainant has the benefit of lifelong anonymity pursuant to the provisions of the Sexual Offences (Amendment) Act.
5. The group of colleagues went to a bar in Shoreditch. They all drank a great deal and by the end of the evening PRP was described as being "extremely drunk" and her colleagues were concerned about how she would get home. One of PRP's colleagues described PRP as being "probably a little bit messy", she was struggling to stand and was a bit louder than usual. Another colleague left the venue in an Uber with PRP in order to drop her home. He did not know exactly where PRP lived but believed it was reasonably near his home address in London N16 so he planned to drop her on the way. As he did not know exactly where PRP lived he decided to get the Uber to drop them off in the approximate area where he believed PRP lived and would walk home from there. The Uber dropped them off in a road in London N16 at 11.26 pm. The witness described PRP struggling to walk properly at this point and although she said they were in the wrong street she was unsure of where they needed to head to and was unable to articulate where she needed to go. They spent some time looking for the correct street. The colleague then called another Uber which arrived at 12.20 am on 26 July with the intention of dropping PRP in the correct street. Both the witness and PRP got into the second Uber and travelled for about a minute before PRP got out of the vehicle. The colleague was then driven home by the Uber to his address.
6. The next thing that PRP remembered was waking up in Mr Moreno's car. Mr Moreno was not known to her. He was naked. At first PRP was unsure what was happening.

PRP was lying prone diagonally across the back seat but with her legs in the air. Mr Moreno was in a crouched or sitting position. PRP's pants and shorts had been removed. Mr Moreno had a number of his fingers inside PRP's vagina and anus. Mr Moreno forcefully tried to put as much of his hand in PRP's vagina as he could. PRP repeatedly told and begged Mr Moreno to stop, which eventually he did. Mr Moreno then asked PRP to give him oral sex. Mr Moreno grabbed PRP's hands and put it on his genitals. PRP described being scared about what would happen if she did not comply and so describes attempting to masturbate him so that she did not have to do anything else. She recalled that Mr Moreno remained flaccid and then the activity stopped. PRP used the opportunity to look through her bag to check that she had her keys. She found her keys but not her phone - that had inadvertently been taken by her colleague when they called an Uber. PRP then got out of the car and went as quickly as she could to her flat which was nearby. She remembered looking back to check that Mr Moreno was not following her, which he was not. On returning to her flat PRP described things as being a "bit fuzzy" at that point but she entered and locked the door behind her. She then went to sleep and woke the next morning.

7. When going to the bathroom the next morning she noticed blood from her genital area and at around 5.30 am texted a friend in America and told him what had happened. In the messages she said: "He kept asking me to give him a BJ. He was completely flaccid. I don't know if he fucked me or not but he was trying to fist me and put stuff in my butt. I kept saying 'please stop'".
8. An ABE interview was conducted with PRP some two days later on 28 July 2019.
9. Samples taken from PRP's clothing provided a link by DNA to Mr Moreno. He was arrested on 12 January 2020. He was interviewed under caution and provided three

statements saying that he had consensual sexual activity with PRP. PRP provided a statement, recording that she had suffered moderate psychological distress, significant PTSD and depression. Her work had been affected and she had about 230 hours of therapy (including 63 hours of calls with a support worker). By the conclusion of therapy sessions PRP was suffering from mild psychological distress, moderate depression and some remaining traumatic experiences. That was particularised in a victim personal statement to which we will return.

### **The proceedings**

10. The proceedings were started by postal requisition on 6 August 2021, a delay of some 19 months after the arrest and that is a point on which we have been addressed. Mr Moreno pleaded not guilty and a trial was fixed for 27 June 2022. The trial was disrupted because of industrial action and then listed again on 30 June 2022. There was some discussion about timetabling because of the industrial action and some discussion about sentence. In the final event Mr Moreno pleaded guilty to the two counts of assault by penetration.

### **The Sentence**

11. When sentencing, the judge said that the pleas to the offences were uploaded prior to the victim personal statement and the victim's letter being provided to the defence. That victim personal statement and letter provided details of the psychological treatments that had been undertaken by the victim. The judge went on to state that he considered it unjust when considering the Guidelines to take into account information made available after the offender had entered his pleas. The judge held that this was a category 3B case. He found the category to be category 3 harm on the basis that he could not be sure the victim should be treated as particularly vulnerable due to her personal circumstances. That only arose because of intoxication. He again stated that no other harm factors were

put forward and that the material relevant to the psychological impact came after pleas were tendered. The judge said that no culpability A factors were present and the judge indicated that for someone of good character, after trial, the starting point would be 2 years with a range of up to 4 years for a single offence. The judge found the aggravating factors to be location, namely the back of the car with no prospect of escape, timing of the offence, namely at night and the offences were committed when the victim was heavily intoxicated. Finally, the offences were committed when there were few people around who might have been able to intervene. The judge went on to state that the aggravating factors were of sufficient importance to cause a starting point to rise within the indicative range and to outweigh the single mitigating factor which was that at the relevant time Mr Moreno had no relevant convictions recorded against him. The judge also noted some additional mitigation afforded on account of delay but that arguably delay caused after the first opportunity for Mr Moreno to enter a plea in the proceedings would not be taken into account.

12. In relation to the Inner London proceedings the judge recorded that Mr Moreno was on bail for the index offences at the time that he committed the further sexual offences and that that had been treated as an aggravating factor in the Inner London case. He went on to indicate the sentence of 24 months imposed at Inner London Crown Court on 8 April 2022 for the other sexual offences was relevant to issues of totality, as the two sets of offences could have been dealt with at the same time although there was no criticism that they were not. The judge indicated that the greatest mitigation was Mr Moreno's plea on the first day of trial for which 15 per cent credit would be awarded and this was justified despite the late plea as it avoided the need for PRP to give evidence. No finding of dangerousness was made and an indefinite restraining order was made.

### **The Offence Specific Sentencing Guideline**

13. The relevant Guideline provides for three categories of harm. Category 1 is for the extreme nature of one or more category 2 factors. Relevant category 2 factors are severe psychological or physical harm, prolonged detention sustained incident, victim is particularly vulnerable due to personal circumstances and additional humiliation or degradation. Category 3 is where category 1 and 2 factors are not present.
14. There are two culpability categories A and B and it was common ground that this was a culpability B offence. The starting point for category 2B was 6 years with a range of 4 to 9 years and for category 3B was 2 years with a range from a high level community order to 4 years' custody. Relevant aggravating factors include the location and timing of the offence and the judge also identified that the offence was committed when the victim was heavily intoxicated. Relevant mitigating factors included no relevant previous convictions and the fact that there was delay before the proceedings were started.

### **An Unduly Lenient Sentence**

15. We deal with the third ground of the Reference first. We do not consider that the complaint about the discount of 15 per cent for the plea of guilty to be well founded. Although the relevant Sentencing Guideline provides that a reduction for guilty plea should be decreased from a quarter to a maximum of a tenth on the first day of trial, it became apparent that this was unlikely to be the first day of trial because of issues surrounding availability of representation due to industrial action and the presence of the jury. The judge was, in our judgment in the particular circumstances of this case, entitled to take a reduction of 15 per cent.
16. As to the second ground of the Reference, we do consider that the judge was wrong to ignore the evidence about the effect of the offending on PRP as set out in her victim

personal statement. It was not possible to have produced the victim personal statement before the plea because Mr Moreno was pleading not guilty and there had been substantial delays in commencing and then progressing the prosecution. It is apparent that PRP suffered real harm and underwent extensive treatment.

17. As to the first ground and the correct categorisation, we turn to consider whether there were any category 2 factors. Although there was physical and psychological harm in the victim personal statement that was set out there, we accept that it could not be described as "severe" for the purposes of the Sentencing Guideline. It should be noted that this conclusion does not in any sense undermine or minimise the effect of the offending on PRP.
18. We have considered whether this was a prolonged detention sustained incident for the purpose of the Guideline. This was not relied on by the prosecution below and there is no reliable evidence about the timelines for understandable reasons. It is right to identify, as Ms Gates has done, that there were steps recorded on PRP's phone at about 3.00 am in the morning but it was not clear where those steps were recorded, and whether it was PRP returning from the incident or it was PRP moving about her flat. It is also right to identify that it would have taken at least some time for PRP and Mr Moreno to end up in the position that they had. It is not possible, on all the material before us, to say that this was a prolonged detention or sustained incident. We have also considered whether there was additional humiliation or degradation; because of the attempts to force his whole hand into her vagina. This was not a submission which was made by the prosecution to the judge and we consider it best to reflect all of the circumstances that the offending within the relevant sentence rather than treat this as a separate matter given the difficulties and understandable inconsistencies in the descriptions as to what occurred



between the ABE, the texts and the reports to others.

19. This leads to the issue of whether PRP was particularly vulnerable due to personal circumstances. It is established that the factors in Sentencing Guidelines are to be interpreted in accordance with the ordinary meaning of the words used. The personal circumstances in this case were that PRP had drunk so much that she was unable to walk properly and was unable to find the street in which she lived and she was on the street alone at night. The continuing effect of the drink is one reason why there is no evidence about whether this was a prolonged detention sustained incident or whether there was additional humiliation or degradation. A person in PRP's circumstances was "particularly vulnerable" because they are defenceless, see generally R v Bunyan [2017] EWCA Crim 872 at paragraph 25 and R v Sepulvida-Gomez [2019] EWCA Crim 2174; [2020] 4 WLR 11. This fact is part evidenced by the way in which PRP came to be in the back of Mr Moreno's car. The circumstances in which particular vulnerability will occur will vary considerably but we reject the submission that PRP's vulnerability was at the lower end. It is obvious from all that we have read that she was particularly vulnerable in a very intoxicated state, alone at night on the streets.
20. This means that the judge was wrong to place this as a category 3B offence; it was a category 2B offence. As Ms Osborne has pointed out, there is an overlap between category 2B and 3B but that does not mean that the correct category should not be taken for the purposes of the starting point.
21. We do consider that this sentence was not just lenient but it was unduly lenient. We note that the judge treated the fact that PRP was heavily intoxicated as a separate aggravating factor and so we will need to avoid double counting when considering the adjustment to be made to the sentence.

22. We do consider that it is therefore necessary to revisit the sentence that was imposed on Mr Moreno. This was a category 2B offence with a starting point of 6 years. The relevant aggravating factors, once the victim's drunkenness had been removed as a separate aggravating factor, and mitigating factors including delay roughly balance each other out, leaving a sentence of 6 years or 72 months for one count alone. A reduction of 15 per cent for a guilty plea would give a sentence of 61 months (5 years 1 month) if it had stood alone. But there is a separate count (count 2) which increases the criminality to the sentence on count 1 because the sentence for the separate count should remain concurrent in order to reflect issues of totality. There is the nature of the offending which we have referred to. Any sentence however will be served consecutively to the sentence of imprisonment for 24 months for the offences committed against Mr Moreno's flatmate. Ms Osborne points out that taking account of the previous sentence Mr Moreno will actually have served a sentence of 5 years and 2 months, which is a considerable sentence and points to the Sentencing Council Guideline on Totality which provides that where an offender is serving a determinate sentence the court should "consider what the sentence length would have been if the court had dealt with the offences at the same time and ensure that the totality of the sentence is just and proportionate ..."

23. In these cases there was separate offending against separate victims which caused separate harm. Consecutive sentences were therefore inevitable so far as the Inner London and this matter was concerned, but the final sentence must be just and proportionate.

24. Doing the best that we can to reflect all of the issues of totality, increasing count 1 to reflect the criminal offending on count 2 but reducing the sentence to reflect the other existing sentence, we make a modest adjustment for totality by reducing the notional

sentence that we had indicated before of 61 months to 60 months and consider that sentence to be just and proportionate. For all these reasons we will increase the sentence on count 1 from 38 months (3 years and 2 months) to 60 months (5 years) and leave the sentence on count 2 of 30 months undisturbed. The sentence of 5 years will be served consecutively to the existing sentence from Inner London Crown Court giving an overall sentence of 7 years. To that extent the Reference is allowed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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